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No. 83-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA, *et al.*,
Petitioners,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Dissatisifed with the Petitioners' presentation of the question presented, Respondents state the question as follows:

> Did the Court of Appeals correctly conclude that *Burford*-type abstention is improper in railroad tax discrimination cases under 49 U.S.C. § 11503 where:
>
> a. Congress has expressly determined that the national interest requires the elimination of discriminatory state taxation of rail transportation property; and
>
> b. Congress has expressly conferred jurisdiction upon federal district courts to prevent such discrimination?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioners are the State Board of Equalization of the State of Georgia and its members, Marcus E. Collins, Sr., Michael J. Bowers, Jimmy Lester, William M. Nixon, Jr. and Joe Mack Wilson. Petitioners will be referred to hereinafter as the "State Board."

Respondents are the United States of America and certain railroads operating within the State of Georgia. The railroad petitioners (hereinafter referred to as the "railroads") are: Southern Railway Company, The Alabama Great Southern Railway Company, Central of Georgia Railroad Company, The Georgia Northern Railway Company, Georgia Southern and Florida Railway Company, Live Oak, Perry and South Georgia Railway Company, Tennessee, Alabama and Georgia Railway Company, Seaboard Coast Line Railroad Company, and Louisville and Nashville Railroad Company. The parents, subsidiaries and affiliates of these railroads are numerous and are listed in Appendix A to this brief.

This brief is filed on behalf of all Respondents except the United States of America.

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OPINIONS BELOW

Citations to the opinions and judgments delivered in the courts below are set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the statute involved in this case, Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976), now codified at 49 U.S.C. § 11503, are set forth in

the Petition. In accordance with the practice of the Eleventh Circuit, the railroads will refer to this statute as "Section 11503."

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the State Board's Statement of the Case, the railroads adopt as their counterstatement the Court of Appeals' description of the case as set forth in *Southern Ry. Co.* v. *State Bd. of Equalization*, Appendix to the Petition, pp. 3a through 7a, with the following supplement:

Following the issuance of the Eleventh Circuit's decision in this case, the State Board moved for a stay of the mandate of the Court of Appeals pending the filing of the petition for certiorari. That motion was denied on October 24, 1983.

In addition, the railroads contend that the State Board's Statement of the Case contains a number of errors. The most important of those errors is an attempt to describe state administrative proceedings which occurred prior to the filing of the railroads' complaint in federal court. The State Board makes the following assertion:

> Each railroad agreed that the State Board had jurisdiction to grant relief based upon [Section 11503], and actively litigated its [Section 11503] cause of action before the State Board.

Petition, p. 3. This statement is erroneous. The railroads have never conceded, nor do they now concede, that state administrative agencies have jurisdiction to grant relief under Section 11503. Rather, the railroads only acknowledged that the State Board had jurisdiction *under Georgia law* to grant the railroads equalization relief which might obviate the necessity for filing a federal action

under Section 11503. The railroads raised Section 11503 before the State Board in order to exhaust available state administrative remedies, to give to the State Board an opportunity to grant equalization relief meeting the requirements of Section 11503, and to avoid any later suggestion that the railroads had "waived" their Section 11503 rights by failing to raise them at the state administrative level.

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals' Decision Does Not Conflict With Any Decision Of A Court Of Appeals Or Of This Court.

The State Board asserts that the Court of Appeals' decision "conflict[s] with a half century of Supreme Court jurisprudence." Petition, pp. 7, 12. This assertion is incorrect. This Court has never ruled that federal courts should decline jurisdiction where national interests are paramount and where the rights being asserted by the plaintiffs are precisely the federal rights which Congress sought to protect by enacting special remedial legislation.

Before the District Court and the Court of Appeals, the State Board argued that the railroads' Section 11503 complaint should be dismissed under the principles of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, Sun Oil Company brought an action in federal court to enjoin enforcement of an order of the Texas Railroad Commission which granted Burford a permit to drill four wells in the East Texas oil field. Jurisdiction was predicated upon diversity and upon an alleged violation of the Fourteenth Amendment. This Court held that Sun Oil's complaint should have been dismissed because the exercise of federal jurisdiction in that case would have been disruptive of state efforts to establish a coherent local policy with respect to the exploitation of Texas oil and gas fields. The first step in this Court's analysis in *Burford* was to look at

congressional policy regarding oil conservation matters. This Court noted that the federal government had chosen to leave the principal responsibility for oil conservation regulation with the states. *Id.* at 319.

The State Board contends that *Burford* establishes the principle that courts are not constrained by congressional policy in determining whether to exercise jurisdiction in a particular case. Petition, p. 8. The State Board's contention ignores the essential point, mentioned above, that this Court in deciding *Burford* specifically noted that Congress had chosen to leave the regulatory responsibility for oil conservation to the states. Thus, the State Board's assertion that this Court in *Burford* disregarded congressional policy in determining whether jurisdiction should be exercised is in error.

The reasons which justified abstention in *Burford* are not present in this case. This case involves a national problem, i.e. disruption to interstate commerce resulting from discriminatory taxation of railroads, not a local problem as in *Burford*. In enacting Section 11503, Congress specifically determined that the principal responsibility for eliminating discriminatory taxation of railroads should *not* be left with the states.

The State Board also contended below, as it contends here, that the exercise of federal jurisdiction in Section 11503 cases will disrupt the administration of state ad valorem taxes and that *Burford*-type abstention, or dismissal, is therefore appropriate. However, the Court of Appeals concluded that, insofar as a state seeks to impose discriminatory ad valorem taxes upon interstate railroads, Congress *intended* to disrupt the administration of state ad valorem taxes. As noted by the Court of Appeals, Congress enacted Section 11503 in order to facilitate interstate commerce and to protect railroads from the

debilitating effects of discriminatory state and local taxation. Congress thoroughly considered the effects which Section 11503 would have upon state tax policies and administration and determined that a federal judicial remedy was essential to protect the right to nondiscriminatory tax treatment. Because Congress had determined that federal interests were paramount in Section 11503 cases, the Court of Appeals concluded that *Burford*-type abstention was improper.

The only cases cited in the Petition for the existence of a "conflict" which are not addressed in the Eleventh Circuit's opinion are *Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341 (1951), and *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959). Neither case involves the exercise of federal jurisdiction under a statute, such as Section 11503, which expressly confers jurisdiction upon federal district courts to remedy a specific problem of national concern. Furthermore, the Petition misconstrues *Alabama Public Service Commission* in two respects. First, the Petition incorrectly asserts that the "28 U.S.C. § 1342 argument rejected in [*Alabama Public Service Commission*] is virtually identical to the 28 U.S.C. § 1341 argument accepted by the Court of Appeals below, making clear the conflict in principle between the two decisions." Petition, p. 12. The exemption from 28 U.S.C. § 1342 which the railroad in *Alabama Public Service Commission* sought to supply by negative inference is *not* equivalent to the specific exemption from 28 U.S.C. § 1341 found in Section 11503. Second, the Petition fails to note that this Court in *Alabama Public Service Commission* first looked at congressional policy in considering the abstention question. There this Court stated:

> [I]t has long been held that this interblending of the interstate and intrastate operations does not deprive

> the states of their primary authority over intrastate transportation *in the absence of congressional action supplementing that authority.*

341 U.S. at 345 (emphasis added). Properly interpreted, *Alabama Public Service Commission* directly supports the railroads' position that congressional intent controls the exercise of federal jurisdiction, and refutes the State Board's assertion of a conflict with the decision of the Court of Appeals in this case.

The State Board also contends that the decision of the Court of Appeals is "in clear conflict" with *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981). Petition, p. 9. This is not so. In its opinion the Court of Appeals discussed *Fair Assessment* at length and concluded that the decision in *Fair Assessment* has no application to this case. In *Fair Assessment*, this Court ruled that the principle of comity, together with 28 U.S.C. § 1341, require abstention even though jurisdiction exists under 42 U.S.C. § 1983. The Court of Appeals found, however, that the "clash" between two divergent lines of statutory authority in *Fair Assessment* was not present in this case. The court noted that the legislative history of Section 11503, unlike that of 42 U.S.C. § 1983, evidences a congressional intent to exempt taxpayers from the Tax Injunction Act as well as from the comity principle. The court noted further that, because the economic due process claims in *Fair Assessment* fell at the extreme periphery of the concern behind 42 U.S.C. § 1983, abstention in that context left the vital core of 42 U.S.C. § 1983 protections intact. The Court of Appeals then stated:

> Abstention here, in contrast, would rob the jurisdictional grant of section 11503 of all meaning, since the railroad plaintiffs belong to the small class of direct beneficiaries contemplated by Congress and seek

> precisely the tax relief the section affords. Finally, the potential for wholesale federal litigation of state taxpayer claims, very real under section 1983, is nonexistent under section 11503.

Appendix to the Petition, p. 15a.

In response to the State Board's suggestions of disruption and a "conflict," the railroads rely upon the reasoning of, and the authorities cited by, the Court of Appeals. The Court of Appeals stated:

> The extensive legislative history of the [Railroad Revitalization and Regulatory Reform] Act and its numerous predecessor bills makes it clear that Congress thoroughly considered the effects the Act would have on state taxation policies and practices. After weighing these effects, Congress concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property. *See*, e.g., S. Rep. No. 630 at 6-8; S. Rep. No. 1483 at 6. Congress provided for both solutions in the resulting law.
>
> '[A] court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.' *Patsy* v. *Board of Regents*, 457 U.S. 496, 501-02, 102 S.Ct. 2557, 2560-61, 73 L. Ed.2d 172 (1982). The legislative history of section 11503 demonstrates that Congress intended to carve out an exception not only to the Tax Injunction Act, but also to the underlying doctrine of equitable restraint in the narrow area of discriminatory taxation of railroads. Congress meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose. Since Congress has spoken, it is not our province to alter the balance Congress struck in providing

a federal forum for rail carrier claims of tax discrimination under section 11503.

Appendix to the Petition, pp. 13a-14a.

The contentions of the State Board constitute nothing more than a reargument of the merits of the abstention issue and do not present any grounds for the issuance of a writ of certiorari.

2. No Special Or Important Reasons Exist For Granting The Writ.

The State Board contends that this case is important for two reasons: (1) the Court of Appeals' decision is an erroneous precedent that may be followed by other circuits; and (2) the exercise of federal jurisdiction in Section 11503 cases would disrupt the assessment, levy and collection of ad valorem taxes from railroad taxpayers in Georgia. Once again, these reasons are nothing more than a reargument of the State Board's contention that the Court of Appeals erred on the merits. Neither reason warrants the grant of certiorari.

It is the District Court's decision to abstain in this case that is in error—not the Court of Appeals' decision. This is borne out by the litigation history of Section 11503 since the date of the District Court's decision. Although the defense of abstention has been raised in numerous Section 11503 cases since this case was decided at the district court level, no district court has chosen to abstain in such cases. See *Atchison, Topeka & Santa Fe Ry.* v. *Lennen*, 552 F.Supp. 1031, 1037-38 (D. Kan. 1982); *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 559 F.Supp. 1237, 1248-49 (D. Ariz. 1983); *Southern Pacific Transportation Co.* v. *California*, No. C 81-4848 S.W. (N.D. Cal., filed September 1, 1982); *Trailer Train* v. *State Board of Tax Commissioners*, No. IP 82-45-C (S.D. Ind., filed Novem-

ber 3, 1982); *Burlington Northern R.R.* v. *Bair*, Civ. No. 83-100-A (S.D. Iowa, filed June 17, 1983); *Chesapeake and Ohio Railway Company, et al.* v. *Herschel H. Rose, III, Tax Commissioner, etc., et al.*, No. 82-2564 (S.D. W.Va., filed August 22, 1983).[1]

Contrary to the State Board's second contention, potential disruption to state finances is no ground for refusing to enforce congressional legislation which restricts a state's taxing power. In *Aloha Airlines* v. *Director of Taxation of Hawaii*, ___ U.S. ___, 104 S.Ct. 291 (1983), this Court dismissed as irrelevant the State of Hawaii's argument that the federal statute at issue in that case, 49 U.S.C. § 1513(a), interfered with Hawaii's system of taxation. This Court stated:

> We acknowledge that our interpretation of § 1513(a) may result in the disruption of state systems of taxation; we are, however, bound by the plain language of the statute. Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce, see *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979), and we trust that Congress will amend § 1513(a) if it concludes, upon reconsideration, that the preemptive sweep of the current version is too great.

104 S.Ct. at 295, n. 10.

As the Court of Appeals correctly recognized in this case, disruption of state finances is an inevitable consequence of congressional regulation of state taxation. Since the disruption to state finances that will result from the exercise of jurisdiction in Section 11503 cases was plainly anticipated and intended by Congress, such "dis-

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[1] Copies of the unpublished opinions cited herein have been lodged with the Clerk of this Court.

ruption" cannot be used as a reason for declining the exercise of federal jurisdiction.

The essence of the State Board's argument is that the Court of Appeals' deference to congressional intent is novel, harmful, erroneous and in conflict with established case law. The railroads respectfully submit, however, that the Court of Appeals decision has none of these characteristics and is in complete accord with relevant decisions of this Court. The latest pronouncement by this Court regarding judicial deference to congressional intent in matters of jurisdiction is contained in *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), where this Court stated:

> (Respondents) argue that an exhaustion requirement would lessen the perceived burden that § 1983 actions impose on federal courts; would further the goal of comity and improve federal-state relations by postponing federal court review until after the state administrative agency had passed on the issue; and would enable the agency, which presumably has expertise in the area at issue, to enlighten the federal court's ultimate decision.
>
> As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent.

457 U.S. at 512-513. The same principles applied by this Court in *Patsy* to determine whether jurisdiction should be declined for failure to exhaust apply with equal force to determine whether a court should abstain. In all such instances congressional intent controls the exercise of jurisdiction.

CONCLUSION

The Petition simply restates arguments on the merits made before the Eleventh Circuit. Such arguments do not

present any ground for granting certiorari within Rule 17 of the Rules of this Court. The Petition should, therefore, be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

RESPONDENT, SOUTHERN RAILWAY COMPANY IS A WHOLLY-OWNED SUBSIDIARY OF NORFOLK SOUTHERN CORPORATION AND IS THE PARENT OF RESPONDENTS, ALABAMA GREAT SOUTHERN RAILROAD COMPANY, CENTRAL OF GEORGIA RAILROAD COMPANY, THE GEORGIA NORTHERN RAILWAY COMPANY, GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY, LIVE OAK, PERRY AND SOUTH GEORGIA RAILWAY COMPANY, AND TENNESSEE, ALABAMA AND GEORGIA RAILWAY COMPANY. THE SUBSIDIARIES OF RESPONDENTS WITH SECURITIES OUTSTANDING IN THE HANDS OF THE PUBLIC ARE:

Arrowood Southern Executive Park, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlantic and East Carolina Railway Company
Carolina and Northwestern Railway Company
Cincinnati, New Orleans and Texas Pacific Railway Company
Citico Realty Company
Danville and Western Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Mobile and Birmingham Railroad Company
New Orleans Terminal Company
The North Carolina Midland Railroad Company
St. Johns River Terminal Company
The South Western Rail Road Company
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Railway - Carolina Division
Southern Region Industrial Realty, Inc.
State University Railroad Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Affiliates of Seaboard Coast Line Railroad Company and Louisville and Nashville Railroad Company

Name of Affiliate:

Atlanta and West Point Rail Road Company
CSX Corporation
James Center Development Company
Wesjax Development Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Railroad Company of South Carolina, The
Central Transfer Railway and Storage Company
Chatham Terminal Company
Monon Coal Company, Inc.
Chicago and Western Indiana Railroad Company
First Georgia Development Corporation
Fruit Growers Express Company
Louisville, Henderson & St. Louis Railway Company
Nashville & Decatur Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company
Richmond, Fredericksburg and Potomac Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company